MEDIATION STRATEGIES

A LAWYER'S GUIDE TO SUCCESSFUL NEGOTIATION

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INTRODUCTION

Every successful negotiation requires that you have a sound strategy. In the pages that follow I will explain the steps that I believe you should follow when developing a mediation strategy.

To lay the groundwork for my explanation I first want to discuss the characteristics of a good mediation advocate. As a mediator I have been able to observe many excellent attorneys who took a strategic approach to the process. All of them shared these same characteristics.

Preparedness. Just as in trial work, preparation is the key. It is essential that you bring with you all of the ammunition that you can muster in order to persuade the other side. With a good command of both the facts and the law you can negotiate from a position of strength. And your client should feel confident that he is positioned to get the best available settlement.

Openness and Candor. Parties will settle cases when they feel that they have sufficient information to evaluate their prospects in litigation. Some of this information usually needs to come from the other side. Mediation presents an opportunity to have a forthright exchange of information so that no one feels that they are being left in the dark. Withholding information is generally counter-productive and may cause the other side to suspect weakness in your case.

Patience. I have been involved in many cases, both as attorney and as mediator, which required long hours, more than one session, or extensive follow up work on the telephone. At some point it can be tempting to give up instead of staying focused on the objective. You must resist the temptation to rush the process.

Willingness to Compromise. This attribute is the most important of all. No mediation should ever be undertaken unless both the lawyer and the client are prepared to make a reasonable compromise. Participants must realize that almost every lawsuit involves risk. The party who is determined to “win” is usually wasting everyone’s time.

THE ESSENTIAL STEPS TO SUCCESSFUL NEGOTIATION

There are twelve essential steps to a successful negotiation. If that sounds like too much to remember, it is not. All of the steps are based on common sense. And if you have the characteristics which I described on the preceding page, following the steps should be automatic.

1. Get to the table.
2. Pick the right time to mediate.
3. Choose the right mediator.
4. Have pre-mediation conferences.
5. Set aside sufficient time.
6. Prepare your client.
7. Prepare a powerful position paper.
8. Insist on full settlement authority.
9. Maximize the benefits of the joint session.
10. Set the tone with your opening statement.
11. Get into a zone of bargaining as soon as possible.
12. Don’t take a bottom line approach.

GETTING TO THE TABLE

"Too Far Apart?" If you were to ask me for the main reason why people are reluctant to mediate, it would be the perception that the parties are "too far apart." Or, "It would be a waste of time because the other side is so unreasonable."

Whenever I hear these common refrains I try to point out that they are the very reasons why mediation is indicated. If the two sides were already close, then they would probably be able to settle the case on their own. It is precisely because they are so polarized that they need the intervention of a mediator.

Stories abound of cases that were thought to be hopeless but that still settled at mediation. Here is a lawyer's comment that I read recently: "The parties have been in litigation with each other for years. All prior attempts at mediation had failed. In light of this unfortunate situation, I held little hope that mediation would work. I have rarely been so happy to have been so wrong."

In most of the cases that I mediate, we start the day with the two sides at opposite ends of the spectrum. Opinions about responsibility seem to be diametrically opposed. When numbers are put on the table, the initial offer sounds like a token response to the demand. But the trick is to keep talking because the longer that the parties talk the closer they will usually get to a solution.

"Just Do It." Mediators are not miracle workers. The secret of their success is knowing that the parties are never too far apart to explore settlement. Many disagreements are grounded in emotion rather than reason, and it takes time for the emotions to subside. Once these obstacles are overcome, resolution can usually follow. So to parties who are reluctant to come to the table, my advice would be "Just do it."

THE RIGHT TIME TO MEDIATE

In a perfect world parties would agree to mediate as soon as possible after their disputes arose. In the real world they are often inclined to do the opposite and wait until the eve of trial. Concessions can often be obtained when the other side is faced with a deadline, and for most litigants the deadline does not occur until they are faced with going to trial.

Early Mediation. Still, many cases can be and are settled earlier. An early mediation can be an opportunity for a plaintiff to reconsider an ill-advised lawsuit. Or if it is a "thin case" the plaintiff may want to settle before a lot of time and expense has been put into it.

Even the better cases will sometimes lend themselves to an early mediation. For example, an injured plaintiff may be interested in an early resolution in order to alleviate a financial hardship. But in these situations the lawyers will first need to investigate the facts, do the necessary discovery and allow the defense the opportunity to make an intelligent evaluation of the claim. Accelerating your preparation will be the key.

Court-Ordered Mediation. Courts will sometimes send parties to mediation before a case is ready to settle. If so, counsel should try to use the mediation as an opportunity to exchange information, streamline discovery, and lay the groundwork for future negotiations. Often this will open the way to negotiation and settlement.

Talk to Opposing Counsel. If you are wondering whether it is the right time to mediate, the best way to find out is probably to talk to your opposing counsel. Find out if she feels that the case is ready to settle, and the reasons why or why not. It can also be helpful to have the mediator talk confidentially with both sides in advance to find out if they are ready to resolve the case.

CHOOSING THE MEDIATOR

The success or failure of a mediation often depends on who the mediator is. Before retaining a mediator you should find out as much as you can about his or her qualifications and methods. Then evaluate the mediator in light of each of the factors discussed below to see if he or she is right for your case.

Style. It is often said that there are two kinds of mediators: facilitators and evaluators. Facilitators promote communication between the parties in order to help them reach a mutually acceptable resolution. The pure facilitator refrains from expressing any opinion on the merits of the case. Evaluators will express an opinion on what a case is worth or at least on the merits of positions. The best mediators will use an approach that draws upon both styles as the needs of the case require. A mediator should not, however, predict the outcome of the case in court or purport to advise a party what to do.

Familiarity. There is sometimes a misconception that the mediator should not have had any prior relationship with the parties or their counsel. Although the proposed mediator should disclose any such relationships, no ethical rule precludes the use of a mediator who knows or has dealt with one or more of the participants. Many litigators believe that the best mediator to use is the one that the other side knows and wants since the mediation is more likely to succeed if the adversary trusts the mediator.

Focus on Settlement. Being an effective mediator often requires an extraordinary amount of patience, and many cases will not settle at the first meeting. The mediator must be prepared to follow up and to work with the parties until the case is resolved.

Subject Matter Expertise. Lawyers are generally looking for a mediator who has expertise in the type of case at hand. The lack of such expertise will create a steeper learning curve for the mediator and may put him or her at a disadvantage when trying to evaluate positions. Keep in mind, however, that subject matter expertise without adequate process skills will not make a person suitable to be a mediator.

Training and Experience. A qualified mediator will have undergone formal training in the process and have accumulated substantial experience. Subject matter expertise without formal training in mediation is generally not sufficient. Indeed, an untrained mediator may actually do more harm than good.

PRE-MEDIATION CONFERENCES

Settling cases can be challenging. Even the small cases, the ones that people tell me will be "simple," can require an unexpected amount of time and effort. In order to make the job easier, I try to establish at the outset a collaborative relationship with counsel for the parties.

The process starts with pre-mediation telephone conferences between the attorneys and the mediator. In mediation, unlike arbitration, ex parte contacts are entirely proper. And because they are part of the mediation everything that is said is confidential.

What to Discuss. The main items that need to be covered in these conferences are some of the essential steps to success that are discussed in this booklet. They include:

- Making sure that individuals with full settlement authority will be present.
- Setting aside adequate time to complete the mediation.
- Setting a date for the exchange of position papers.
- Preparing the clients.
- Preparing to make a convincing presentation in the joint session.
- Talking about the process itself so that everyone will be comfortable with how it will be conducted.

Confidential Information. A telephone conference with the mediator also provides an opportunity to discuss in advance any information that would be helpful in resolving the case but that should be conveyed in confidence. Personality or emotional issues would fall into this category. The attorney may also need to ask for the mediator's assistance in explaining the realities of litigation to the client.

The more that the mediator knows in advance the better prepared he or she will be to help settle the case. So let the mediator in advance how he or she can best help you.

HOW LONG SHOULD IT TAKE?

Not long ago, I received calls from two lawyers who wanted me to mediate their cases. One said, "We want you to set aside the entire day for this case because we really want to settle." The other one said, "This is a very simple case, it shouldn't take more than a couple of hours, and we should know pretty quickly whether it is going to settle or not." Which of these cases is more likely to be settled?

The first caller was optimistic about settlement. He also realized that a successful mediation can easily take a full day and that it is unwise to set arbitrary time limits. The second caller exhibited just the opposite attitude. His message was: "We're pretty sure that we're right and we will mediate for a couple of hours to see if you can get the other side to agree. But after that, if we don't like what we're hearing then we are just going to leave."

The "couple of hours" approach is usually not realistic. You need to come to mediation with an open mind. Perhaps there is a problem with your case that has not occurred to you. Maybe it is not as simple as you think. What may seem simple to the lawyers is often not so simple to the clients. The mediator will need time to explore the issues and the risks of litigation with the parties before he or she can start to guide them through the process of negotiation.

While I have had many cases that did settle in a half day, I have also had many that lasted well into the evening. Since I never know how long a case will take, I always like to start in the morning and to set aside the entire day. If we finish early that's fine, but I don't want to risk running out of time.

Patience is the key. If the participants really want to settle they should be prepared to spend whatever time it takes. How much is enough? Who can say that the mediation is over even if you haven't settled? That is one of the reasons why you hire a mediator.

PREPARING THE CLIENT

Before going to mediation you must prepare your client. The client must understand that a mediation is not like a court proceeding and must be clear on the roles of all the participants.

Rather than just spending a few minutes on the telephone, I would suggest that you meet with the client and go over the following points.

- The mediator's role is to be neutral. The mediator will not attempt to decide who is right or wrong.
- It is not enough to impress the mediator; you have to impress the other side.
- Don't expect the mediator to evaluate the case. Mediators typically know less about the case than the parties do.
- People are far more willing to compromise with those whom they respect and whom they find to be reasonable and courteous.
- You cannot risk damaging your credibility through exaggeration or false statements.
- You must give the other side everything they need to hang their hat on.
- Do not personalize the case; separate the people from the problem.
- Be prepared to agree with the opponents when they are right.
- Have two numbers in mind: what we will initially ask for, and what you really want. But be prepared to keep an open mind and do not adopt a bottom-line approach.
- Be prepared to stay until the case is resolved or until the mediator says that an impasse has been reached.
- Some cases will take more than one session to settle. Do not be discouraged if the case does not settle at the first mediation.

After a review of the foregoing points the client should know what to expect. But since the client will probably be speaking during the joint session you should also go over his or her remarks. A well-prepared and articulate client is generally your best asset.

PREPARING THE POSITION PAPER

The purposes of a position paper are to educate the mediator about the nature of the case, to demonstrate the strong points of your case, and to set the stage for a successful negotiation. The following suggestions will help you to write a powerful position paper that accomplishes these purposes.

Remember Your Objective. The goal of mediation is to end the dispute. Ironically, some position papers appear to be written as if the purpose were to prolong the dispute. Expressions of outrage, name-calling or accusing people of lying are counter-productive. It will move the parties even further from an agreement than they already are. Mediation is intended to be a "time-out" from the litigation and should be treated as such. Consider using letter form rather than pleading form.

Exchange Position Papers. Occasionally counsel will refuse to provide copies of their position papers to the other side. This refusal sends precisely the wrong message. It indicates a desire to withhold information or to rely upon the element of surprise. It also raises suspicion that there may be flaws in your case that you are trying to hide. Participants in mediation must be willing to engage in a good faith exchange of information. So that neither party will have an unfair advantage, ask the mediator to set a date a few days in advance of the mediation when the parties can exchange position papers.

Support Your Statements. In reading your paper, the mediator will be interested in learning about the factual background of the case, the key issues and the areas of agreement and disagreement. More importantly, the opposition will be looking to see how strong your case really is. Arguments must be supported by evidence that would be admissible at trial. Attach key documents and other exhibits as well as copies of cases that you believe to be controlling.

Express Your Interest in Settling the Case. When you read the other side's position paper you will probably find numerous statements with which you disagree. Reading them is apt to be discouraging. But if you find at the end of their paper a statement that they are interested in settling you are apt to be more optimistic that the case can be resolved. So follow the golden rule and put such a statement in your own paper.

SETTLEMENT AUTHORITY: DON'T LEAVE HOME WITHOUT IT

The most common cause of a failed mediation is the absence of persons with real settlement authority. Settlement authority means the authority to agree to whatever is necessary and reasonable in order to dispose of the case.

Limited Authority. Sometimes we see client representatives being sent to mediation who purport to have full authority to settle but who in reality have only limited authority based upon their side's unilateral evaluation of the case. Any attempt by the mediator to convince them that the case should be settled on terms which are beyond that authority is generally futile. The lack of real authority is usually apparent to everyone. If the other side is fully empowered to settle, they will become justifiably upset at the uneven playing field and will probably lose interest in further mediation. Attempts to bring them back to the table at a later time may not succeed.

Sometimes it is not possible to have the person present who has unlimited discretion to settle. In such cases the mediation should probably be rescheduled until that person is available. Alternatively, you may have to bring someone with a reasonable amount of authority and make arrangements to have the actual decision-maker available on the telephone. In that event be sure to secure the agreement of the mediator and the other parties in advance.

Institutional Parties. In many cases there will not be any one individual who has actual settlement authority. Insurance carriers and other institutions that operate by committee will evaluate a case on the basis of information submitted in advance. Based upon that evaluation they will send a representative who is authorized to settle up to a specific amount. In these situations it is essential that the claimant provide all necessary information in a timely manner so that the maximum authority will have been granted.

It is the mediator’s job to see that the individuals who are authorized to settle the case are present. If you want to have a successful mediation, do not try to mislead the mediator or the other side about this critical element of the process. Bring full settlement authority, and insist that the other side do the same.

THE JOINT SESSION

The mediation should begin with a joint session in which the mediator invites both sides to state their positions. The mediator moderates the discussion and insures that each person, including the clients, has an opportunity to speak without interruption. Time will also be provided for rebuttals or to pose questions to the other side.

Parties will sometimes ask to skip the joint session and go straight into private caucus with the mediator. The usual explanation for this request will be that the two sides are already familiar with the facts and with their respective positions. Or if there has been a high level of animosity counsel may be reluctant to have their clients in the same room. While there may be sound reasons in some cases for omitting the joint session, it should not be done lightly since it provides a number of valuable opportunities.

Direct Dialogue. The joint session may be the first time that all of the lawyers and clients have been together in the same place. Any previous meetings may have been in an adversarial context such as a deposition, where parties are restricted to answering questions. The joint session provides a unique opportunity for parties to open up, be candid, and deliver their message to everyone in the room. For most clients it will be as close as they get to a "day in court." And if the client presents well the joint session is a perfect opportunity to showcase that asset.

The joint session also provides important opportunities to a lawyer. You can state your position directly to the principals on the other side. Prior to the mediation all communications will have gone through opposing counsel, but hearing directly from you may be far more persuasive.

Airing Factual Disputes. Parties are generally quite sure that they understand what the facts are. But facts are almost always in dispute. Everyone needs to have a clear picture of what these disputes are about. This part of the process works effectively only when all the participants are sitting around the table. Having the mediator shuttle back and forth between caucuses to explain differing versions of the facts is inefficient and wasteful of time.

Setting the Tone. Sitting down at the table can be be an occasion to express your willingness to compromise and even to show some empathy for the opposing party. Agreements are much easier to reach when the other side can see that you are approaching the mediation with the right attitude, that you have heard what they have to say, and that you are willing to take their point of view into account.

THE OPENING STATEMENT

At the start of the joint session each side makes a presentation that may resemble a lawyer's opening statement to a jury. It is a statement of what they would intend to prove if the case were tried. While there are similarities, a mediation is not a trial and there are important differences that must be kept in mind.

- Speak directly to the other side rather than just to the mediator. The mediator is not a judge.
- Address your remarks to the opposing party as well as to counsel. The less legalistic you can make it, the better.
- Avoid threats and offensive remarks. Project an air of quiet confidence rather than a sense of righteousness.
- Discuss the evidence. Try to talk in a realistic way about what a fact finder is likely to conclude from the evidence rather than about what "really happened." You may not change the other side's mind but you may be able to get them thinking about how a trial would play out.
- Acknowledge any weaknesses in your case rather than waiting for the other side to bring them up. Explain how you plan to deal with them.
- Ask the mediator to provide you with an opportunity to respond to the other side. Use this time to summarize their arguments, showing that you listened carefully to what they had to say, but pointing out where you disagree. If there are areas of agreement, be sure to mention them.
- Reiterate your client's interest in settling the case.

A good opening statement will set the tone for a productive day. It should be powerful, but low-keyed. The emphasis should be primarily on facts, rather than on theories or allegations.

Above all, avoid antagonistic remarks. It may be tempting to use the joint session as an opportunity to blow off steam or to try to intimidate the other side. But ask yourself: will these tactics make them more inclined to see things your way? Or will it just harden their resistance?

DEMANDS AND OFFERS

Starting at the Extremes. "They want how much? I think we're just wasting our time here. Their case isn't worth anything close to that."

"You mean this is all they intend to offer? I don't think they want to settle."

These are the words that mediators often hear in the initial caucuses. The explanation, of course, is that parties tend to start with extreme numbers. Any good negotiator wants to leave plenty of room to bargain. And the lawyer never wants the client to think that he or she started out by asking for too little or offering too much.

Mediators will sometimes have to communicate extreme opening numbers even when they know that the other side may become discouraged. The mediator who balks at communicating a party's opening position risks alienating that party and may cause her to question the mediator's neutrality.

Getting Real. At the same time, however, a good mediator will urge the parties to come up as soon as possible with numbers that bear a rational relationship to what the case is worth. An outrageously high demand or low offer will probably have to be followed by a large concession. The party who finds herself in this position will have lost credibility and will have given the advantage to the other side.

The Zone of Bargaining. Before any case can be settled, the parties have to enter into a zone of bargaining in which the demand and offer are both supportable in light of the facts of the case. Getting into this zone as soon as possible will make the process easier for all.

The easiest way to get into the zone is to start talking about the amount of the claimant's damages. Debates about theories of recovery and defenses can go on forever, but once the parties start talking about how much the claimant has actually lost negotiations will usually start to become productive.

Somebody has to make the first move and typically it will be the claimant. Making this move should not be considered a sign of weakness. A reasonable offer or demand will send a message to the other side that you are seriously interested in settling. Simply tell the mediator to convey to the other side that you are making a significant move with the expectation that they will do the same. And provide a rationale for the move. Tie it to a specific issue on which you are willing to concede some risk. More often that not, a significant move by one side will cause the other side to reciprocate, thus paving the way for an agreement.

THE BOTTOM LINE

When preparing for mediation a client usually wants to talk to his lawyer about what the bottom line should be. While it is only natural to take this approach it is not necessarily productive. Parties who start with a bottom line approach often come to mediation with unrealistic notions. In order to make progress toward resolution they will have to set those notions aside.

A Learning Experience. The process of mediation is a negotiation, but it is also a learning experience. Information will come from the other side that may affect the evaluation of the case. The mediator will be asked to give opinions on the relative strengths and weaknesses of positions. All of this information will have to be taken into account in order to arrive at a settlement. Parties must be encouraged to keep an open mind and to realize that the evaluation of their case only comes at the end of the mediation.

Determining Value. The true value of any lawsuit is determined in a manner that is similar to the valuation of an asset. Fair market value is determined by what a willing buyer will accept and what a willing seller will pay. The number that an appraiser would give may be reasonably accurate, but it does not represent actual value. In like manner the value of a lawsuit can only be determined through negotiation. The number that the plaintiff is willing to accept and that the defendant is willing to pay is what the case is worth.

Mediators generally discourage parties from giving them a bottom line since these numbers, when spoken out loud, are difficult to retract. When preparing for mediation, parties are well-advised to spend more time thinking about such things as the strengths and weaknesses of their case, the costs of litigation, and the risks that they are assuming if the case does not settle. The bottom line will eventually take care of itself.

CONCLUSION

It was Abraham Lincoln who said that “A good settlement is better than a good lawsuit.” The fact that the vast majority of civil cases are settled proves that his admonition has been taken to heart. And the widespread acceptance of mediation shows that it is a superior form of dispute resolution.

Achieving a good settlement through mediation requires the parties to take a different approach than in the courtroom. The use of litigation skills in mediation is not productive. Deal-making skills will serve the advocate far better.

If you prepare carefully, adopt a candid attitude, have patience and are willing to compromise, you will find that mediation works well for you and your clients.